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August 23, 1993

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions
MM Docket No. 92-264

Dear Mr. Caton:

Please find enclosed, on behalf of the National Association of Telecommunications Officers and Advisors, et al., an original and nine copies of the Comments of the National Association of Telecommunications Officers and Advisors, et. al, in the above-referenced proceeding.

Any questions regarding the submission should be referred to the undersigned.

Sincerely,

William E. Cook Jr.

William E. Cook, Jr.

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992	MM Docket No. 92-264
Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions	

TO: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL ASSOCIATION OF COUNTIES

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Dated: August 23, 1993

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SUMMARY

Subscriber limits and channel occupancy limits are important means of ensuring that large vertically- and horizontally-integrated MSOs are not able to engage in anticompetitive behavior that has the effect of reducing diversity in the distribution of news and entertainment programming. Local Government believe that Congress intended for these limits to be applied strictly and uniformly, with few if any exceptions.

With regard to the channel occupancy limits, Local Governments believe that local franchising authorities, as the entities closest to the problems created by vertical integration and most familiar with the ownership structure and channel line-ups of local cable operators, should be primarily responsible for monitoring and enforcing the channel occupancy limits. Further, Local Governments encourage the Commission to adopt channel occupancy limits that apply to as wide a range of operators and affiliated programmers as possible, with exceptions made in those rare circumstances where doing so would be in the public interest.

As for subscriber limits, Local Governments believe that a limit of 25% of homes passed nationwide is the highest percentage limit that should be considered by the Commission, and that the Commission

should only consider lower limits. In calculating compliance with the subscriber limits, the Commission should not adjust the limits based on areas that may be subject to effective competition. Finally, the Commission should allow de minimus waivers of the subscriber limits, but such waivers should only be granted on a case-by-case basis, and only where additional time is necessary in connection with the approval of a transfer.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions	MM Docket No. 92-264

TO: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL ASSOCIATION OF COUNTIES

The National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties (collectively, the "Local Governments") hereby submit these comments in the above-captioned proceeding.

I. INTRODUCTION

On July 23, 1993, the Federal Communications Commission ("FCC" or "Commission") released a Report and Order and Further Notice of Proposed Rule Making in this

proceeding.[1] The Commission seeks further comment on implementation of subscriber limits and channel occupancy limits under section 11 of the 1992 Act.[2] The subscriber limits and channel occupancy limits are vital parts of the scheme enacted by Congress to ensure that true competition develops and flourishes in the cable industry. Congress directed the Commission to implement these limits because it was concerned that increased concentration and integration in the cable industry had the potential to undermine the goal of competition and reduce diversity in the distribution of news and entertainment programming.[3]

With regard to the channel occupancy limits, it is important that local franchising authorities, as the regulatory entities most familiar with the programming line-ups of the local cable operators, be primarily responsible for enforcing the channel occupancy limits. Further, Local Governments are concerned that the effect of these new ownership limits will be weakened if the Commission does not create strong rules that are generally applicable to all operators and programmers. While the

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[1] Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions, FCC 93-264 (adopted June 24, 1993) ("FNPRM").

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Act").

[3] H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 40-41 (1992) ("House Report").

Local Governments support the limits proposed by the Commission, they are concerned that the Commission is considering a wide array of exceptions to the rules that could gut their effectiveness. The Local Governments urge the Commission to apply the limits as uniformly as possible, on a temporary basis, allowing exceptions in only limited and extraordinary circumstances.

As for the subscriber limits, a limit of 25% of homes passed nationwide is the highest percentage limit that the Commission should consider. Further, the subscriber limits should contain as few exceptions or grounds for waiver as possible.

II. DISCUSSION

A. Channel Occupancy Limits

Channel occupancy limits are an important mechanism for preventing anticompetitive behavior. Increasing vertical integration in the cable industry has enabled some cable operators to favor their affiliated programming services to the disadvantage of unaffiliated programmers. As Congress noted, "some cable operators favor programming services in which they have an interest, denying system access to programmers affiliated with rival MSOs and discriminating against rival programming services with regard to price, channel positioning, and promotion." House Report at 41. Congress' purpose in enacting the

channel occupancy limits was to reduce the ability of cable operators to engage in this type of behavior.

1. Franchising Authorities Should be Primarily Responsible for Enforcing the Channel Occupancy Limits.

The Commission has proposed that it, rather than franchising authorities, should have responsibility for monitoring and enforcing compliance with the channel occupancy limits. FNPRM at ¶ 242. This reverses the Commission's proposal in the initial Notice of Proposed Rule Making to give franchising authorities the primary enforcement role.

Local Governments believe that it is important that franchising authorities be given primary responsibility for monitoring and enforcing the channel occupancy limits. The effects of vertical integration are most pronounced at the local level; it is subscribers that are harmed when unaffiliated programmers are not able to obtain carriage, and local franchising authorities should be empowered to deal with this problem and protect consumers' interests. Placing the monitoring and enforcement power with the Commission in Washington, D.C. means that enforcement will be far removed from the locus of the problem and the facts. It is important to consider that the channel occupancy limits will differ from system to system based on each system's channel line-up. Local franchising authorities, not the Commission, are most familiar with the day-to-day

operations of the operator and the contents of each system's line-up.

The Commission questions whether local franchising authorities have either the resources or the expertise to effectively monitor compliance with the channel occupancy limits. Local Governments submit that they are experienced in their roles as regulators and committed to the goals of diversity and competition. Franchising authorities, with the assistance of staff and/or counsel, are more than capable of deciphering ownership issues. If a franchising authority needs additional information relating to ownership, it can request such information from the operator or from the Commission. Local Governments understand that there may be occasions where a local franchising authority is unable to monitor and enforce the provisions adequately, and in such circumstances the franchising authority should be able to waive its authority in favor of Commission enforcement.

Alternatively, in such circumstances the operator could submit a statement of its programming affiliates as well as its channel line-up simultaneously to the Commission and the franchising authority, and either entity could take whatever action it deemed necessary. However, each franchising authority should be given the prerogative to monitor and enforce the channel occupancy limits itself. We believe this division of responsibility is consistent

with the intent of Congress and the policy of the FCC to have shared federal-local responsibilities, and first-level responsibility at the local government level whenever possible.

2. The Channel Occupancy Limits Should be Applicable to as Wide a Range of Operators and Affiliated Programmers as Possible.

The Commission has proposed to adopt a 40% limit on the number of channels that can be occupied on a cable system by programming in which the particular cable operator has an attributable interest. FNPRM at ¶ 170. While the Local Governments believe that a lower channel occupancy limit would better serve the Congressional goals of ensuring that competing programmers are able to gain carriage on rival cable systems, they believe a 40% channel[4] limit may be acceptable so long as it is not rendered meaningless by numerous exceptions.[5]

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[4] Local Governments note that the correct standard to be applied is 40% of channels. The Commission should disregard the suggestion of TCI that the channel occupancy limits be measured based on bandwidth. The statute and the legislative history both speak to limits on occupancy of "channels." Utilizing a measurement such as bandwidth would be directly contrary to the express language used by Congress; such a measure also would be more difficult to measure and enforce.

[5] Local Governments support the Commission's conclusion that all pay-per-view and pay-per-channel programming should be counted against the permitted number of channels that may be occupied by affiliated programmers, as such channels -- like any other affiliated channels -- take up space that could otherwise be occupied by unaffiliated programmers.

The Commission has tentatively concluded that the total channel capacity for the purposes of calculating the channel occupancy limits should include all activated channels. Local Governments believe that this is in error. The channel capacity should not include over-the-air broadcast channels, PEG channels and non-video channels. The legislative history of section 11 explicitly states that the "FCC should establish these rules based on the number of activated channels less the number of over-the-air broadcast signals carried and the number of public, educational and governmental and leased access channels carried." S. Rep. No. 102-92, 102d Cong., 1st Sess. 80 (1991) ("Senate Report") (emphasis added). This is especially true in light of the high 40% limit that the Commission proposes to adopt.

The number of exceptions to the channel occupancy limits that the Commission has proposed in the FNPRM, if implemented, would together swallow the rule. It is important to note that Congress did not provide for any exceptions to the channel occupancy limits. If Congress had intended for there to be exceptions to these rules, it would have stated so explicitly. Local Governments believe that the Commission should adopt only temporary exceptions to the channel occupancy limits, and only in very limited and extraordinary circumstances, and only where there is a genuine public interest need for an exception. Further, in

such rare circumstances the local franchising authority should be consulted regarding the public interest and local experience before any such waivers are granted.

For example, the Commission asks whether systems should be allowed to carry additional affiliated programming where no unaffiliated or competing programmer seeks carriage and the capacity would otherwise go unused. FNPRM at ¶ 184. Because it benefits neither the subscriber nor the operator for usable channel capacity to remain dark, Local Governments believe that this is a worthwhile exception, but only subject to certain limitations. The operator should be required to certify to the Commission, with a copy to the local franchising authority, that no unaffiliated or competing programmer has sought to utilize this channel space, and that there is no other use for which the channel space would otherwise be utilized. Such certification should be required at least every six months. In addition, the Commission should adopt procedures to ensure that any unaffiliated or competing programmer that seeks carriage on such channels is able to obtain carriage within 30 days of the date it notifies the operator of its desire to be carried.[6] Further, the Commission should

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[6] Local Governments realize that the operator cannot generally be forced to carry unaffiliated or competing programming. However, in keeping with the statute, if the operator does not wish to carry the unaffiliated or competing programming, it must nonetheless drop the

[Footnote continued on next page]

establish sanctions to be applied in the case of an operator that provides a misstatement in connection with a certification or fails to make otherwise unused capacity available within 30 days of such a request. These procedures are the minimum requirements that would be needed to ensure that this otherwise open-ended exception to the channel occupancy limits would not be abused.

Similarly, Local Governments believe that it would be in the public interest to adopt an exception from the channel occupancy limits for minority-controlled or -targeted programming. However, because this exception also could be open to abuse by operators, who could claim a variety of programming to be minority-targeted, the Commission should define the term "minority" in such a clearly-articulated way that the exception will not be abused.

The Commission asks for comment on whether an exception from the channel occupancy limits should be allowed for local and regional networks. FNPRM at ¶ 219. Local Governments believe that, while it may be in the public interest to allow an exception for noncommercial, not-for-profit local or regional programming, there is no

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[Footnote continued from previous page]
affiliated programming that is being carried on the "excess" channel(s), as these channels could no longer qualify for the exception as channel space that would otherwise go unused.

legitimate reason to allow a general exception for all local or regional networks. Most local and regional networks offer primarily sports programming, and are part of large national conglomerates. For example, SportsChannel offers regional sports networks in 8 regions around the United States, with a total of approximately 11 million subscribers.[7] These SportsChannel regional sports networks are controlled by Rainbow Programming Holdings, Inc., a wholly-owned subsidiary of Cablevision Systems Corporation, the nation's fourth largest MSO. This is precisely the type of vertical integration that the channel occupancy limits are meant to address. There is no reason whatsoever for such programming to be excepted from the channel occupancy limits.

Aside from the very limited exceptions discussed above, Local Governments believe that the Commission should ensure that the channel occupancy limits apply to all operators and affiliated programmers. The Commission in the FNPRM seeks comment on a number of other exceptions. Local Governments believe that adoption of any or all of these exceptions would render the channel occupancy limits totally ineffective. The 40% limit is already a fairly high limit. The creation of any additional exceptions would significantly undermine the goals of these limits.

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[7] 1992 Cable & Television Factbook, at F-11.

For example, the Commission seeks comment on whether it would be appropriate to allow an exception for "new" programming. FNPRM at ¶ 221. Local Governments agree with the Commission's tentative conclusion that such an exception is not warranted. Such a broad exception as "new" programming would be open to abuse, as affiliated programmers could constantly repackage existing programming services and call them "new." Further, the purpose of the channel occupancy limits is to ensure that there is sufficient space on cable systems for the new programming of unaffiliated programmers. This goal would not be served if the channel space were occupied by affiliated programming, even if such programming were new.

Similarly, Local Governments oppose the Commission's proposal to establish a channel capacity threshold beyond which channel occupancy limits would no longer apply. FNPRM at ¶ 226. The rationale behind establishing the channel occupancy limits is to ensure that a certain amount of a cable operator's capacity will be reserved for unaffiliated or competing programming. This rationale is as compelling no matter how many channels a system offers. The channel occupancy limits are needed to ensure that, no matter what the capacity of the system, the operator will not engage in anticompetitive behavior in barring the programming of unaffiliated or competing programmers.

Local Governments also oppose the proposal of the Commission to eliminate the channel occupancy limits in communities where effective competition is established. FNPRM at ¶ 231. Such a proposal has not been mandated by Congress. While Congress explicitly provided an exception to rate regulation in areas not subject to effective competition,[8] it did not do so here. Had Congress intended that such an exception to the channel occupancy limits be implemented, it would have stated so explicitly, as it did with rate regulation.

Similarly, where Congress intended for certain activities to be grandfathered under the 1992 Act, it stated so explicitly.[9] The Commission, however, proposes to grandfather all vertically integrated programming services that were carried as of December 4, 1992 which exceed the channel occupancy limits. FNPRM at ¶ 236. Local Governments believe that, in addition to the fact that grandfathering under this section has not been sanctioned by Congress, allowing such grandfathering would further weaken the channel occupancy limits. Grandfathering would mean that the status quo as of December 4, 1992 would be frozen. This would in no way help unaffiliated programmers which need assistance in

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[8] See 47 U.S.C. § 543(a)(2).

[9] See, e.g., 47 U.S.C. § 548(h).

obtaining carriage on cable systems. If a system's capacity and line-up remain what they were on December 4, 1992, and the operator was at that time following a trend which Congress discerned of refusing to carry unaffiliated programming, then unaffiliated programmers would for the foreseeable future be barred from such system. Only by enforcing the channel occupancy limits on all systems will the goal of ensuring that unaffiliated and competing programmers are able to obtain carriage be achieved.

B. Subscriber Limits

Congress directed the Commission to adopt subscriber limits because of the concern that excessive horizontal concentration in the cable industry provides incentives for MSOs to impede competition by discouraging the formation of new cable programming services. House Report at 42. For example, excessive concentration of ownership may make it difficult for a new cable programming service to be launched if a large MSO offering affiliated programming that competes with the new programmer controls enough of the market to ensure that the new programmer will not be able to reach a large enough audience to succeed. Local Governments believe that subscriber limits are a necessary means to preventing large MSOs from engaging in such anticompetitive behavior.

The Commission has proposed to adopt a national subscriber limit of 25% of homes passed. FNPRM at ¶ 134.

The Commission noted that it is still soliciting comment on establishing subscriber limits in the 20% to 35% range. Local Governments believe that the 25% limit is the highest percentage limit that the Commission should consider.[10] Local Governments believe that a subscriber limit over 25% would negate any benefit that such a limit would engender, since an MSO that were to reach over 25% of the nation's cable homes would wield excessive market power.

Local Governments support the Commission's conclusion that homes passed, rather than total subscribers, is the appropriate measure to be used in measuring compliance with the subscriber limits. However, the Commission should not subtract the number of homes passed by cable systems in areas where there is effective competition in measuring the homes passed. FNPRM at ¶ 152. The national subscriber limits are meant to address issues of excess market power wielded on a nationwide basis. Whether certain areas of the nation experience effective competition is irrelevant to this goal. The ability of a large MSO to discourage the formation of a new programming service will not be lessened because it may face effective competition in some percentage of the nation it serves. Further, as discussed above with regard to the channel

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[10] NATOA has a standing policy that no MSO should be permitted to reach more than 15% of homes passed in the nation. The National League of Cities has a policy in support of a 25% limit.

occupancy limits, there is no indication that Congress intended for the subscriber limits to include an exception for effective competition.

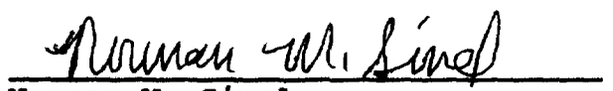
Finally, the Commission seeks comment as to whether it should grant waivers in instances of de minimus violations of the subscriber limits. While Local Governments realize that there may be limited circumstances under which such de minimus waivers will be necessary, they believe that such waivers must only be given under certain conditions. First, the Commission should grant such waivers on a case-by-case basis to avoid abuse. Second, such waivers should only be granted in the context of transfers of systems where, because of the time necessary for approval by the Commission and/or the franchising authority, the subscriber limits will be exceeded only temporarily and for a short period of time. Accordingly, such waivers should have an appropriate time limit.

III. CONCLUSION

The channel occupancy limits and subscriber limits are key parts of the scheme developed by Congress to ensure that large horizontally- and vertically-integrated MSOs are not able to use their considerable market power in order to engage in anticompetitive behaviors that can reduce diverse programming choices. Local Governments believe that, in order for these competition-enhancing provisions to work

effectively, the Commission must adopt stringent measures that are uniformly applied.

Respectfully submitted,



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